Exhibit A

Motion Hearing Transcript (November 14, 2024)

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

CENTRAL DIVISION

SHANNON ARNSTEIN, et al.,)

Plaintiffs,)

vs.) Case No. 2:24-CV-344RJS

SUNDANCE HOLDINGS GROUP,)

L.L.C.,)

Defendant.)

_____)

BEFORE THE HONORABLE ROBERT J. SHELBY

November 14, 2024

Motion Hearing

A P P E A R A N C E S

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November 14, 2024 1:30 p.m.

P R O C E E D I N G S

THE COURT: Good afternoon, everyone, and welcome.

We'll go on the record and call case number 2:24-CV-344, Arnstein versus Sundance Holdings Group. This is the time set for hearing on the defendant's motion to dismiss.

Should we make our appearances starting with the plaintiffs?

MR. SCOFIELD: David Scofield, Your Honor, appearing for the plaintiff. My lead counsel, who is admitted pro hac vice, is here and I will let him introduce himself.

THE COURT: Great.

MR. HEDIN: Frank Hedin on behalf of the plaintiffs.

THE COURT: Thank you.

MR. CAMERON: Good afternoon, Your Honor. Jordan Cameron for the defendants, local counsel, with Elizabeth Rinehart.

THE COURT: Welcome to all of you. We appreciate you making time for this hearing.

In advance of our hearing we have carefully studied your papers, we have familiarized ourselves with

your arguments and we have reviewed a lot of cases and I think we understand your arguments and positions. As is almost always the case in a civil hearing, at least, I like to come to the bench and paint the targets for you and share my initial views of life, with the caveat and understanding that we're always here with an open heart and an open mind, eager to hear what you think we have misunderstood or misapplied.

So these are tentative views, but I ought to have a good idea generally on a Rule 12 motion, at least, what I think. I'm going to overshare for a minute. It was my practice for many years coming to the bench that if a litigant faced a risk of losing a claim or a case, we're going to have a hearing. They would have a chance to come to court and make their arguments through their lawyer and see a judge who is hopefully well prepared and impartial and committed to applying the rule of law.

I started to make an exception for some Rule 12(b)(6) motions because we had some awkward hearings. If I have read the complaint and I am just asking do I think there is a plausible claim, there is not a lot of room for argument, and we have that issue in part here.

Here are my initial views. Sundance may take issue with whether some of the allegations in the complaint have a reliably factual basis, but they are there. I see

the guardrail for Rule 12(b)(6) as Rule 11. I am required to accept the allegations as true and there are sufficient allegations in the complaint to form a plausible claim for relief. If some day we learn that there is no factual basis for it, then we have a different remedy for that problem. I will hear any argument you want to make today, of course, but that is my impression after reading the complaint.

Second, I think Judge Parrish's Curry decision is highly persuasive to me and I think it is correct. I will be eager to visit with Sundance about a couple of things.

First, I will just say I don't share Sundance's view that step one of the Shady Grove analysis is open. I think it is closed to me at least. I think I'm bound by both Justice Scalia's discussion in part, what is it, 2-A of the Shady Grove decision, and I count five justices joining in that part of the discussion. He answers the question about may and Rule 23 I think clearly, but even if he didn't, when we get to Justice Stevens' concurring opinion he performs a step one analysis and essentially says the same thing in my view in the opening paragraph of that analysis.

I think this case is a step two case and on balance I share Judge Parrish's views of it, I think. I believe this is a closer case than the New York statute at issue in Shady Grove, and in my view the strongest argument

for the defense of the statute is the fact that the statutory language is in the liability section of the statute which suggests something, but I think the outcome in this case is largely a product of what Justice Stevens describes as the standard that I'm required to apply. He says generally it is a high bar and it is clear from the language that he means that, but beyond that what he says is if we're considering whether there is a Rules Enabling Act issue, I have to be left with no doubt what the legislature intended.

I can see the arguments here and Sundance made the arguments and I think made them as well as you could under the circumstances. I just think that I read the sponsor's legislative history, and I don't think that it -- I'm not even sure how suggestive it is that the sponsor is thinking about the class action litigation bar when he was talking about how conservative he intended the statute to be. I think it is more likely than not that he is talking about penalties when he talks about penalties and that means the $500 limitation on a remedy.

I think there are other things, and my law clerk and I have spent a lot of time thinking about how state legislatures might demonstrate that they intend a class action bar to be part of the substantive description of the rights or remedies and there are many ways this can be done.

I don't think it is a definitive bar just because of the step one analysis by Justices Scalia and Stevens, but there is just not much here for Sundance to work with. I think that gets us where Judge Parrish is.

Those are just my opening thoughts. I'm eager to hear what all of you have to say about it and why I am wrong.

Ms. Rinehart, I see you following along carefully. What do you think about all of that? Come on up to the podium if you would like.

MS. RINEHART: Thank you, Your Honor. I'm going to bring my laptop as a security blanket, but I don't have prepared remarks. I can start off by saying that I fully appreciate Your Honor's decision on step one. We knew that was an uphill --

THE COURT: Not a decision yet.

MS. RINEHART: Well, Your Honor's assessment, tentative assessment of step one. We knew that was an uphill battle. I think the reason we thought to still present it is because when we read Shady Grove and we sort of parsed what Justice Stevens was saying as well as what Justice Scalia was saying in the majority opinion, we found conflict between the concurrence and Justice Scalia's opinion, even though Justice Stevens did sign onto it. I'm sure Your Honor is aware of many political reasons within

the Court why Justice Stevens would concur in the result and have to sign on to that result, but maybe use his concurrence to try to narrow the impact.

That all being said, as I think we mentioned in our reply, ultimately we think what is the most persuasive here is the substantive nature of the class action bar. We also agree that there is not a lot for this Court to go on in terms of legislative history. I think part of the reason is that in 2003 when the statute was being debated Shady Grove hadn't been decided. There certainly wasn't a guide rail for the legislature to follow in order to make its intent known.

So with that we go back to the Justice Stevens concurrence and think about Your Honor's opinion in Roberts where you noted that it is really animated by concerns about federalism and making sure that we respect what the Utah legislature intended. So, yes, there was no discussion of the class action remedy, but there was a pretty heated discussion in a respectful manner about making sure that this law did not become overly burdensome on Utah businesses.

As part of answering those questions, although the representative did not directly speak to the class action bar and the remedy, he emphasized that he wanted to keep the remedies narrow and he wanted to keep all of these things in

check with what he thought was a good balance for the people of Utah. That is why it is included in that liability section. To me I think that is dispositive. I understand Judge Parrish's parsing of it, and I think if the legislature wanted it to be a procedural rule it knows how to do that.

THE COURT: How then do you escape the language that Justice Stevens included in his concurrence addressing this issue in the New York statute and when he is evaluating Justice Ginsburg's dissent? It is essentially your argument and I credit it. I actually don't doubt that that is what the legislature -- I don't mean I don't doubt. I think it is likely that this is part of what they saw as a way of fencing in this claim. But Justice Stevens talked about that, and even if that is the intent of the legislature under the circumstances, it sounds to him like a policy issue, not something drawn to the elements of the cause of action or the available remedies.

MS. RINEHART: I think here is where the Court probably never came to be of one mind and maybe still isn't of one mind, which is when does a remedy become a substantive part of the claim and when does a procedure become part of the remedy? With Justice Stevens, although he did address that element of it, I think ultimately the minute he decided that the New York statute was procedural

he was done with that analysis. There I can see why it was procedural. As Your Honor mentioned, it was set aside in the procedural section and it wasn't intimately tied in.

Where I go to is there would have been no reason for Justice Stevens to continue his discussion and to talk about these other scenarios where a class action bar or some sort of procedural rule is intertwined if he didn't think there was a way in which that could happen. When I come to a case like this, I am at a loss as to how to advise a legislature how else to show that this is supposed to be interwoven with the substantive right that they are creating.

THE COURT: I think the cases that you have found and cited to me in your reply and in your opening motion, too, give us a roadmap for a legislature. Three other states have done it after Shady Grove as you point out.

MS. RINEHART: Correct.

They did have the benefit of Shady Grove, so it was evident that the legislatures were trying to work within that framework. Here we don't have that, but simply as a matter of federalism and in fairness to the Utah legislature, I don't want to give up that argument just because they didn't have the benefit of Shady Grove.

THE COURT: I am not pushing you to give up your arguments.

I will tell you in C.R. England, when I eventually came to the conclusion that I came to in that case, it seemed a strange result to me. It raises genuine federalism concerns in my mind. Of course nobody cares what I think. I'm a district court judge. I'm hearing what you're saying about -- let me get that language in front of me.

I'm sure that this is what you had in mind. I just want to cite Justice Stevens' actual language. When he is talking about the legislative history, he says in that instance the New York legislative history does not clearly describe a judgment that Section 901(b) would operate as a limitation on New York's statutory damages. In evaluating that legislative history it is necessary to distinguish between procedural rules adopted for some policy reason, and seemingly procedural rules that are intimately bound up in the scope of a substantive right or remedy. Although almost every rule is adopted for some reason and has some effect in the outcome of litigation, not every state rule defines the dimensions of a claim itself.

That is true here, too, isn't it, in part C? There is nothing about that bar that describes the dimensions of the right and the cause of action which is described elsewhere at length in the statute.

How do we get around that?

MS. RINEHART: So, Your Honor, I think if you will

indulge me and, again, citing to your Roberts opinion, I think it is a great comparison example of the difference between a procedural state rule that does effect the outcome of the litigation, and whether you have to opt in or opt out could dramatically effect the size of a class, as I think we all know for practical purposes, but it really does not having anything to do with the right that is being created or the remedy that you can get. It is just a procedural vehicle.

On the other hand, here, although it is just a procedural statement, I think it is an example of exactly what Justice Stevens was suggesting could occur, where you had something that appeared procedural but was going to create such a difference in the type of remedy that is available to a litigant that it has to be part of the substantive nature of the claim. I think as a practical purpose -- I apologize --

THE COURT: I want to hear what you have to say.

MS. RINEHART: Those of us who work in the class action world understand that intimately, that there is a big difference between the type of remedy, and not just from a defendant's standpoint, because a plaintiff who becomes a representative plaintiff can recover other things, such as a plaintiff's award or, you know, that type of -- again, not mentioned in the statute because it simply wasn't something

that the legislature would have needed to consider. They thought they were prohibiting class actions. But there is a material difference when a case can be brought as a class action, which is an order of magnitude higher than whether it is an opt in or opt out.

THE COURT: I really appreciate that argument, but I am wondering what weight to give it in view of the fact that -- I have tried to come at this from every angle preparing for our hearing today. A plaintiff could file this claim in state court and other claimants could join under Rule 20 of the Utah Rules of Civil Procedure. The state court would strike the class allegations of a complaint like this one, and in every other respect all of the issues relating to the causes of action, what the elements are, what needs to be pled and what needs to be proven would remain the same. The remedies available to the individual plaintiffs is identical, save for what you just mentioned, the plaintiff's award, but that seems compensation, I think, for the time and energy and responding to the discovery and all of that. That seems pretty clear.

It seems like the other subsections -- I sense from your papers that you take exception with Judge Parrish describing it as surgically removing part of the statute, but I think the thrust of it is the same. It does not

effect the core elements of the claim or the remedies available to the -- I am just thinking out loud for a minute about what you said about the impact on defendants. No question there is hydraulic pressure to settle when it is a class action. The exposure for the defendants is surely different, but even then is there any doubt that the individual claimants would be limited to the statutory cap on their recovery?

MS. RINEHART: No. I agree.

I think what we are struggling with together is this notion that Justice Stevens created that you can have a procedural rule, and to be clear I think this is a procedural section, it is just that it is entwined with the substantive nature of the claim.

For that to be true, for Justice Stevens' framework to be true there has to be a scenario where something that is procedural has such an effect on the litigation and has such a substantive effect on when a claim can be either brought or what kind of award the plaintiff may end up with or what type of remedy or, on the opposite side, the defendant, what type of liability they are facing, that it becomes substantive.

We look to not just the legislative history, which is what it is, but also the way that the statute is set up, and that is where I do part ways with Judge Parrish because,

again, if the legislature wanted this to be a procedural only rule or to somehow be excised from the nature of the claims, they would know how to do that.

THE COURT: I misstated something in my preliminary comments now that I think I should clarify. I think the placement of the class action bar in the liability section is a factor that supports your argument. What I really had in mind and what I think is the best argument for this is the fact that it is limited only to this statute.

MS. RINEHART: Correct.

THE COURT: This bar only applies to this claim.

MS. RINEHART: Correct.

THE COURT: I think that is the strongest argument for it. Rather than just you and I circling around this horse and keep kicking it, tell me what more, if anything, you want to say about the bar.

MS. RINEHART: I would say nothing more than, one, I appreciate how thoughtful Your Honor has treated this argument, and that I really do go back to the idea that this is about federalism and what the legislature of Utah wanted when it created this claim and I think that that should be respected.

THE COURT: Is that what we're really doing when we are engaging in the analysis about whether we have a Rules Enabling Act issue? We're really trying to determine

what the legislature is attempting to do in enacting the state rule?

MS. RINEHART: I think so. I think we are trying to determine that and I think we are also trying to make sure that we are not encouraging forum shopping, right, that we are not discouraging people from bringing claims in state court by offering them something in federal court that is substantively different than what they would get in state court. It is two very important interests that we are trying to protect.

THE COURT: You agree with me that if the state legislature takes exception with Judge Parrish's ruling that they can amend the statute and they can try to more clearly articulate the legislative intent?

MS. RINEHART: I am going to claim a lot of humility here. I am not an expert on what the Utah legislature can and cannot do, but, yes, I would think that if they see this as a problem they could make an affirmative change, although I am not sure how that would effect the existing litigation.

THE COURT: The state legislature thinks that I'm no expert on what they can do and not do, too.

MS. RINEHART: I am in good company then, Your Honor.

THE COURT: That is right.

Well, I'm going to guess that we may have a further discussion about this.

I appreciate your argument, Ms. Rinehart.

MS. RINEHART: Thank you so much.

THE COURT: Mr. Hedin.

MR. HEDIN: Thank you very much, Your Honor.

First of all, I would like to say thank you for having me. My clients and I do appreciate the opportunity to be here and to argue this motion.

I think Your Honor's analysis is spot on and absolutely correct with both step one and step two. I will start with step two and address the arguments that my colleague made.

So the best way to determine what the legislature meant here with the statute is to look at the plain language of it along with the context of the --

THE COURT: I am going to stop you right there. You know, I am trying to remember now if anybody, either Justice Scalia or Justice Stevens talked about legislative intent. The language is -- what is the specific language? A specific -- no. No, that is not it.

MR. HEDIN: In the Utah statute?

THE COURT: No. I am thinking about the step two question.

MR. HEDIN: I believe it is whether or not

applying Rule 23 would modify --

THE COURT: Would enlarge or modify a substantive -- excuse me. Abridge, enlarge, or modify a substantive right. That does not sound like -- I guess legislative intent is just inherently baked into that when we're trying to figure out what the legislature meant when engaging in statutory construction. I just want to make sure I know what I'm supposed to be focused on.

MR. HEDIN: That is correct. I agree with that.

As Judge Parrish said the language and the context of the statutory text alone can answer this question without resorting to the legislative history. That is particularly true in this case given the structure of the liability section of the statute with the three separate subsections that track perfectly -- they basically perfectly track the analysis that the Court has to perform under Shady Grove at step two, which is looking at the rights and the remedies and determining whether the class action bar and the other -- whether applying Rule 23 instead of a state procedural rule would abridge, modify or enlarge those rights or remedies.

THE COURT: Sundance points out that we can look at the statute that way, but we can also look at it more broadly as a statute divided into six parts, and the legislature chose to put the class action bar in the

liability section which means something.

MR. HEDIN: Well, I would point out that there is no procedure section of the statute, and so the fact that it is in a section of the statute that does have other sections that define the substantive rights and remedies is fairly unremarkable in that respect. It is also last. But most important of all, I think, is the threshold idea that Rule 23 and the class action device generally -- it is a claims processing device. It is procedural in nature. It is a species of joinder.

In order for any state rule concerning class actions or the device to define a substantive right or remedy, it is going to be a very difficult thing to do because of just the nature of the device itself as a claims processing device which is procedural in nature. So I agree with the Court that the examples cited in the defendant's motion to dismiss at pages 12 through 14 are good examples of state class action bars that serve to define the substantive rights and remedies afforded under the statute.

So, for example, if the Utah legislature here had said that the statute provides for $500 in statutory damages to any person aggrieved by a violation, but no such person shall bring a class action absent a showing of actual damages or something like that, that could be seen as a state bar on class actions that effect the substantive

rights and remedies under the statute.

The legislature's determination not to do that here controls and in our view really resolves the question.

THE COURT: Pause. Take a breath.

MR. HEDIN: Sure.

THE COURT: First, my court reporter is struggling to keep up with you. You are flying. Second, you're not giving me a chance to interfere with your argument.

MR. HEDIN: Sorry, Your Honor.

THE COURT: Ms. Rinehart's point is that the statute is enacted by the Utah legislature without the benefit of understanding how the Supreme Court is going to treat what they say.

Do you have any serious doubt in your mind that both in the U.C.S.P.A. and in this statute that the reason the legislature included those bars was to provide some level of protection for businesses in the state that were going to be facing potential liability? So, yes, there is a cause of action, you shouldn't do this, and, yes, there is a remedy, because consumers who have been injured by this conduct should be able to get something back, and we mean to limit what kind of serious economic liability you're going to confront.

Do you doubt that that is what the legislature really intended? If you say yes, what did they intend by

including a class action bar?

MR. HEDIN: I don't seriously dispute what Your Honor just said. I do believe, however, that the Utah legislature intended for claims brought in Utah state court -- for the claims processing device of a class action, for claims to be calibrated with respect to claims brought in Utah state court, but when it comes to the Federal Rules of Civil Procedure and Rule 23, Rule 23, nonetheless, applies to a proceeding in federal court even where preventing annihilative punishment, and this is quoting Justice Stevens, is the type of thing that the legislature intended to avoid by enacting the class action bar. It is nonetheless procedural and it does not effect substantive rights or remedies even if that was the legislative aim of the provision.

THE COURT: Where did he say that in his concurrence? I remember reading something like that. I want to make sure I have his actual language in mind.

MR. HEDIN: Yes. Just one minute.

I believe he said it --

THE COURT: That is a really unfair question, to ask you for a pinpoint citation in the middle of your argument.

MR. HEDIN: Just one second.

I have a pincite here of 1458.

Justice Stevens in his concurrence at 434 for the U.S. citation says the decision reflects a policy judgment about which laws should proceed in New York courts in a class action forum and which should not. As Justice Ginsburg carefully outlines, Section 901(b) was apparently adopted in response to fears that the class action procedure applied to statutory penalties would lead to annihilative punishment of the defendant. But statements such as these are not particularly strong evidence that Section 901(b) serves to define who can obtain a statutory penality or that certifying such a class would enlarge New York's remedy. Any device that makes litigation easier makes it easier for plaintiffs to recover damages.

I think that that excerpt right there basically answers the question that Your Honor just asked me, which is even if that is what the legislature was intending, that still is not evidence that the inclusion of this provision in the statutory scheme serves to define the right or the remedy in the way that Shady Grove describes.

As the Court pointed out, the Utah legislature could, and could at any point in the past 20 years since the statute was enacted, could have amended the statute to change it if they felt the need to do that. In fact, legislatures do do that. That has happened to me twice actually in the context of other state's privacy statutes

that originally had class action bars that were determined not to be substantive in nature. So the Utah legislature is well equipped to do that if it feels the need.

THE COURT: I still fall back to instinctively, and I am going to think more about this, but the more we're talking the more I am convinced that I don't know what this opinion means. If you're telling me that the state legislature can have in mind that when they grant a right to the citizenry, and they want to be precise and narrow about the recovery, both in the amount and in the process that you use, coupled together with an intent in mind thinking about the potential impact on future defendants, that that is not meant to be a substantive part of the remedy that is afforded by the legislature. I think there is language in Justice Stevens' opinion that says that, but then I don't know what is a substantive right.

What is a substantive right?

MR. HEDIN: A substantive right is a right to a cause of action and to a claim and what needs to be pleaded or proven in order to establish an entitlement to relief.

THE COURT: And a remedy?

MR. HEDIN: And the remedies are the damages or relief that are provided to people who are aggrieved or suffered violations of that right.

Again, nothing in this provision, Section 203,

Subsection 3, modifies, enlarges or abridges that right, because an individual is entitled to $500 if he establishes a violation and that is uneffected by this provision. 10,000 individual claimants all bringing a case at the same time is permissible. It is permissible even in Utah state court, and the liability is still annihilative in that scenario, so it does not effect the actual underlying substantive claim or remedy that an individual is entitled to under the statute, and the claims processing device and joinder function of Rule 23 in no way modifies that analysis. The placement of the provision in the liability section of the statute or in the notice of intent to sell nonpublic personal information statute generally does not change the analysis, and Your Honor's opinion in Roberts versus C.R. England is thorough, well reasoned, and is very persuasive on this point.

THE COURT: I don't believe anything I write.

MR. HEDIN: The Court thoroughly analyzed the issue there and found that the location of the law within the state statutory code can be useful in discerning --

THE COURT: You need to slow down when you are quoting, please, so that our court reporter --

MR. HEDIN: Sorry, Your Honor.

-- can be useful in discerning the legislature's intent, but cannot itself prove the law is procedural or

substantive in nature.

I think that that makes a lot of sense. It is useful in some cases, because if the provision barring class actions appears in the statute in which the substantive right and remedy are conferred, then oftentimes it will be intertwined, the class action bar will just be intertwined more often than it otherwise would be in that situation. That is true in each of the cases that the defendant cites for that point, but it is not true in this statute.

The provision appears in this statute and it only applies to claims under the statute, but it is cordoned off in a separate subsection, separate and apart from the other subsections that define the rights and remedies, and it can be surgically removed without effecting the rights and remedies provided in those subsections that appear above it.

I briefly would like to address the argument that the potential of a service or an incentive award to a named plaintiff in a class action somehow transforms this procedural provision into one that effects rights and remedies.

Service awards and incentive awards are a species of common law and many circuits no longer even permit them. Even where they are permissible there is no entitlement to a service award or right. An incentive award is purely a discretionary award that the Court may authorize and may

not, and so we don't think that that adds really anything to the analysis. I do believe that my colleague acknowledged that this is just a procedural statement.

That is really where I would like to end this portion of my argument unless the Court has any questions.

This is a procedural statement. Again, it only pertains to the class action device which in and of itself is a procedural device. There is nothing of substance that is implicated in the statutory provision and it does not affect any of the rights or remedies that the previous two sections do address.

Unless the Court has any other questions --

THE COURT: I do have one and probably more.

Aren't remedies and liabilities two different sides of the same coin? So the language that we're to apply at step two of Shady Grove focuses on, among other things, remedies, but isn't that just the converse of liability? Don't those two necessarily go hand in hand?

MR. HEDIN: I believe that liability is the way the defendant would approach the concept of relief being provided to one party who prevails and being provided to one from another, so I think that the liability is the flip side of the coin in respect to, yes, a defendant will be liable for what the plaintiff recovers and the plaintiff is recovering relief under the statute and that is the remedy.

But I don't think that the heading of the statute necessarily really modifies anything with respect to the procedural provision at the end of it.

THE COURT: I guess what I'm just wondering, and I am just thinking out loud, and I had not thought about this until the argument today, and that is one of the reasons I really appreciate the chance to come in and visit with the lawyers and have you coach me. I guess that word remedy sometimes shows up in the phraseology that Justice Stevens uses and sometimes I see that it doesn't when I'm looking, for example, at the bottom of page 422 to 423 when Justice Stevens is talking about the second step of the inquiry and how it can bleed back into the first step.

He says when a federal rule appears to abridge, enlarge or modify a substantive right -- I feel like I have read remedies in there at times, too -- I guess where I am going, and I am just thinking out loud in real time here, is that if I am supposed to consider whether it effects -- whether the rule meaningfully effects remedies, isn't it also fair to ask then in the same context whether it effects the potential liabilities? Or am I expanding the Supreme Court's test if I do that? Why would I focus on just one side of that coin?

MR. HEDIN: I do believe you are expanding it, Your Honor. The aggregation of many persons' claims for

relief could result in the imposition of more liability on the defendant, but it does not affect the substantive nature of the underlying claim for relief or the remedy that is provided to an individual plaintiff who prevails on a claim for relief. The claims processing device does not impact the entitlement to relief, the amount of relief or what needs to be proven or pled in order to establish an entitlement to relief for a claim.

THE COURT: But in the real world it effects the number of class members, the number of claimants, the potential exposure, the likelihood of a settlement, the cost of defending the suit, and all of that dramatically, which is why you like it and why defendants don't, but those are the realities of class litigation.

MR. HEDIN: That is true.

Justice Stevens acknowledged that point in his concurrence. I believe he said that any rule that makes litigation easier, makes it easier for plaintiffs. He also mentioned that although a procedural rule may have a substantial outcome on the effect of a case, does not mean that the rule that led to that outcome effected, abridged, enlarged or modified any of the substantive rights or remedies provided by the statute.

I think that is basically what we have here. We have a provision that practically speaking makes it easier

for plaintiffs. It seeks to calibrate the ease with which claims can be aggregated in Utah state courts, but it cannot do that in federal court, because the Rules Enabling Act authorizes the Supreme Court to promulgate rules, including Rule 23, and those rules are going to control unless they would abridge, modify or enlarge one of the substantive state rights at issue, and that is just not the case here for the reasons we have talked about today and that are set forth in our briefing.

THE COURT: Should we be concerned about the federalism implications of the application of this rule in this case?

MR. HEDIN: I am not particularly concerned with it. If people are concerned with it they should lobby Congress and try to change things, but at this point the decision in Shady Grove is controlling here and we think that Judge Parrish's analysis was correct and that your analysis in Roberts was correct and that the reasoning of those opinions should be adopted by the Court here.

THE COURT: Thank you, Mr. Hedin.

I don't know if we need to hear from you on the 12(b)(6) issue. Is there something more that you wanted to add?

MR. HEDIN: The only thing I would point out is that the Court should look at all of the factual allegations

and accept them as true and draw all reasonable inferences in our favor and then decide whether or not we stated a plausible claim for relief. When you look at the allegations alongside the data card, and in paragraph two and our description of what that card shows and the type of data that is available on it about each of the defendant's customers, we think that the complaint plausibly suggests that the defendant transmitted or rented all of its customers' data to multiple third parties and that we have stated a claim for relief.

I will note that my firm has a lot of experience in litigating cases in the data brokerage context, and we think that this case has a lot of merit.

THE COURT: Thank you.

MR. HEDIN: Thank you, Your Honor.

MS. RINEHART: Your Honor, unless you have a specific question, I just want to address a few points.

THE COURT: I'm just eager to hear what you think after that discussion.

MS. RINEHART: So I think in starting with the discussion of Justice Stevens' opinion, and I think we are all struggling to try and reconcile the various parts of Shady Grove, and clarity would be very appreciated I think either from the Tenth Circuit or the Supreme Court as to how it does apply to these class action waivers that are

embedded within the cause of action, and I think that is where I go when we talk about the language that counsel read into the record regarding the legislative history of the New York statute.

I think here it is different as Your Honor has pointed out, because it is only applying to one claim. As I go later on in Justice Stevens' opinion where he says, and I am going to try and read slowly, the legislative history of Section 901 thus reveals a classically procedural calibration of making it easier to litigate claims in New York courts, parens, under any source of law, close parens, only when it is necessary to do so and not making the emphasis too easy when the class toll is not required.

I tend to agree with Justice Stevens that the point of the law at issue in Shady Grove was not to think about a particular substantive right or remedy. It was to calibrate how claims are brought in New York state courts. That is not the case here. This is a case where the legislature was concerned about creating a right that had a remedy that went outside the actual issue that they were trying to address, and in response they picked both a cap on statutory damages or a specific level of statutory damages, and then intertwined that with a procedural vehicle that would ensure that that statutory cap wouldn't become expedientially greater. That is where I tend to see how it

would accord with Justice Stevens' opinion.

THE COURT: Do I remember that I read in one of the controlling parts of the opinion, and now I don't remember if it was Justice Scalia and the part that Justice Stevens joins or whether it was Justice Stevens, but when thinking about the New York statute and describing the standard that we apply, didn't one of the other of them point out that under the circumstances -- of course there was less legislative -- you almost can't have less legislative history than we have here before us, but they had less --

MS. RINEHART: Right.

THE COURT: -- and they were left to speculate about what the legislature intended and the same is true here. Are we not left to speculate about what function the class bar is to have?

MS. RINEHART: So I think there is some interpretation that has to happen, correct, because the legislature never thought to explicitly talk about it. That being said, and going back to kind of the first principle discussion you were having with counsel earlier, if you're creating a right there can be no right without a remedy, right, otherwise you don't have much of a right at all. And there can be no remedy unless there is also a liability. These are intertwined concepts, and I think the discussion

with the Utah legislature recognized that implicitly, and that is what we get when we have these three pronged liability sections, that they understood that these concepts were all tied together, and that if they are creating a right, they also have to create a remedy and a liability framework.

THE COURT: What else, Ms. Rinehart? Anything else?

MS. RINEHART: Your Honor, you have been very gracious. I don't have anything else, but I am happy to answer any of your questions.

THE COURT: The wise thing for me to do is to pause for a minute and confer with my law clerk, because they are always smarter than I am and they are often thinking of things I am not.

(Time lapse.)

THE COURT: Well, Drake is going to manage to keep his job for another day. He thinks we have sufficiently covered everything. I appreciate your patience and your argument today and appreciate how succinct and direct the briefing was in this case from both sides. Thank you.

We'll take the matter under advisement and we'll get you a timely ruling. Be safe.

We'll be in recess.

MS. RINEHART: Thank you so much.

MR. SCOFIELD: Thank you, Your Honor.

(Proceedings concluded.)